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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas Fourteenth District

BRIEF FOR AMICI CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND TEXAS CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Texas' "homosexual conduct" law, Texas Penal Code § 21.06, which prohibits certain forms of private, consensual sexual activity only between persons of the same sex, violates the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF AMICI CURIAE

The American Psychological Association is a nonprofit scientific and professional organization with more than 155,000 members and affiliates, including the majority of psychologists holding doctoral degrees from accredited universities in this country. The American Psychiatric Association, founded in 1844, is the Nation's leading organization of physicians specializing in psychiatry, with approximately 42,000 members. The National Association of Social Workers (NASW) is a nonprofit professional association of social workers, with more than 150,000 members in every state and internationally. The Texas Chapter of NASW represents 5,625 professional social workers in the State of Texas.[1]

Human sexuality and relationships, and the effects of prejudice, are the concern of a substantial number of *amici*'s members, as researchers or clinicians. *Amici* submit this brief to describe empirical research from the social and behavioral sciences pertaining to sexuality, sexual orientation, and the social psychology of prejudice. This research demonstrates the harms from, and the groundless assumptions behind, the law at issue here.[2]

SUMMARY OF ARGUMENT

I. Decades of research and clinical experience have led all mainstream mental health organizations in this country to the conclusion that homosexuality is a normal form of human sexuality. Homosexuality—defined as a pattern of erotic, affectional, and romantic attraction principally to

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[1] No counsel for a party authored any part of this brief. No person or entity other than *amici* and their counsel made any monetary contribution towards the preparation or submission of this brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

[2] *Amici* acknowledge the assistance of Gregory M. Herek, Ph.D., Susan D. Cochran, Ph.D., Douglas C. Haldeman, Ph.D., Charlotte J. Patterson, Ph.D., and Judith M. Glassgold, Psy.D., in the preparation of this brief.

members of one's own sex—has consistently been found in a substantial portion of the American adult population. Typically, an individual's sexual orientation appears to emerge between middle childhood and early adolescence. Most or many gay men and lesbians (men and women who identify themselves as homosexual) consistently report that they experience either no or little choice in their sexual attraction to persons of their own sex. Research has also found no inherent association between homosexuality and psychopathology. All of this evidence has led mental health professional organizations to conclude that homosexuality is simply one normal variant of sexual identity. These organizations long ago abandoned classifications of homosexuality as a disorder and do not support therapies designed to change sexual orientation. Moreover, there is no reliable scientific evidence of the effectiveness of such therapies.

II. Sexual intimacy is a core aspect of human experience and is important to mental health, psychological well-being, and social adjustment. There is no sound basis in social science for Texas' attempt to deny gay men and lesbians the opportunity to participate in this basic constituent of human happiness. Like heterosexuals, many gay men and lesbians desire to form long-lasting and committed relationships and succeed in doing so. These relationships manifest the same kinds of psychological dynamics as do heterosexual relationships, and sexual intimacy plays an important role in both kinds of partnerships. These committed relationships, in turn, form the core of healthy family units. Many gay men and lesbians are raising children. No evidence suggests that these children will suffer any pathology as a result.

As the Texas law recognizes, the forms of sexual contact that it targets as "deviate sexual intercourse" are in fact among the means that heterosexual couples can use to express intimacy (as many do). For gay partners, these forms of sexual activity are particularly important for expression of sexual intimacy. The mental health professions do not associate oral and anal sex with any psychopathology and do not view them as "deviate."

III. Texas Penal Code § 21.06 reinforces prejudice, discrimination, and violence against gay men and lesbians. Gay people encounter real and substantial manifestations of prejudice in our society, including harassment and violence, because of their sexual orientation. Although many gay men and lesbians learn to cope with the social stigma against homosexuality, this pattern of prejudice can cause gay people serious psychological distress, especially if they attempt to conceal or deny their sexual orientation. Section 21.06 sustains prejudice by discouraging gay men and lesbians from disclosing their true identities to their acquaintances. Studies of interpersonal prejudice, including prejudice against homosexuals, consistently show that prejudice is reduced when members of the majority group have knowing contact with minority group members. But if gay men and lesbians are compelled to conceal their sexual orientation, heterosexuals are denied the opportunity to have personal contact with openly gay people and to perceive them as individuals. The Texas law also discourages gay men and lesbians from seeking legal protection, especially in cases of anti-gay violence, because doing so would require them to disclose their sexual orientation.

ARGUMENT

I. Homosexuality Is A Normal Form Of Human Sexuality

Although Texas defines "[d]eviate sexual intercourse" in terms of certain kinds of sexual activity, regardless of the sex of the partners,[3] Texas Penal Code § 21.06 *prohibits* that conduct, when it is carried out in private and by consenting

[3] Texas Penal Code § 21.01(1) provides: "'Deviate sexual intercourse' means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."

adults, *only* between persons of the same sex.[4] Because Texas does not attempt to punish consensual, private sexual conduct between adults of different sexes, § 21.06 must rest on the perception that intimate sexual activity warrants suppression when, but only when, it occurs between persons of the same sex. Scientific research and the experience of the mental health professions do not support that position. To the contrary, the sexual orientation known as homosexuality—which is based on an enduring pattern of sexual or romantic attraction exclusively or primarily to others of one's own sex[5]—is a normal variant of human sexual expression; it is not a mental or psychological disorder; and it is highly resistant to change.

A. The Significance Of Sexual Orientation

At the root of this case are some basic human truths well documented in empirical research. Sexual attraction and expression are important components of romantic relationships. Sexual orientation is therefore integrally linked to the close bonds that human beings form with others to meet their personal needs for love, attachment, and intimacy.[6]

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[4] Texas Penal Code § 21.06 ("Homosexual Conduct") provides: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."

[5] *Homosexuality*, in Am. Psychol. Ass'n, 4 *Encyclopedia of Psychology* 149 (A.E. Kazdin ed. 2000); *Homosexuality*, in 2 *The Corsini Encyclopedia of Psychology and Behavioral Science* 683-688 (W.E. Craighead & C.B. Nemeroff eds., 3d ed. 2001).

[6] *Sexual orientation* refers to an enduring pattern or disposition to experience erotic, affectional, or romantic attractions primarily to men, to women, or to both sexes. It also refers to the sense of personal and social identity based on those affections and behaviors related to them. *See* J.C. Gonsiorek & J.D. Weinrich, *The Definition and Scope of Sexual Orientation*, in *Homosexuality: Research Implications* 1; *Sexual Orientation*, in 4 *Encyclopedia of Psychology*, *supra*, at 260-263; *Homosexuality*, in 2 *Corsini Encyclopedia*, *supra*, at 683-688. Sexual orientation is usually understood in terms of three categories: *heterosexual*—having sexual and romantic attraction primarily or exclusively to members of the other sex; *homosexual*—having sexual and romantic attraction primarily or exclusively to members of one's own sex; and *bisexual*—having a significant degree of sexual and romantic attraction to both men and women. The concept of sexual orientation encompasses a variety of phenomena, including specific sexual acts; patterns of sexual attractions to men, women, or both; patterns of romantic and emotional bonding with men, women, or both; the personal sense of self as heterosexual, homosexual, or bisexual; public identities as heterosexual, homosexual or bisexual; and membership in a community defined by sexual orientation, *e.g.*, the gay and lesbian communities. *See Homosexuality*, in 4 *Encyclopedia of Psychology*, *supra*; *Homosexuality*, in 2 *Corsini Encyclopedia*, *supra*.

As used in this brief, *gay* refers to men and woman whose social identity or sexual orientation is based on their primary erotic, affectional, and romantic attraction to members of their own sex, and *lesbian* refers to women who are gay.

These bonds also encompass nonsexual physical affection between partners, shared goals and values, mutual support, and ongoing commitment. Because of the fundamental and identity-defining character of these bonds, sexual orientation is closely related to important personal identities, social roles, and community memberships. Just as with heterosexuals, many homosexual persons define themselves in terms of their roles as partners in committed relationships and, in fact, as parents. More broadly, being gay or lesbian is itself often an important personal identity, commonly associated with membership in a minority community, and can also be an important part of a social role. *See* G.M. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Intergroup Contact, and Heterosexuals' Attitudes Toward Lesbians and Gay Men*, in *Out in Force: Sexual Orientation and the Military*, 197, 201-202 (G.M. Herek et al. eds. 1996).

B. The Distribution Of Heterosexuality, Homosexuality, And Bisexuality In The Population

The exact proportions of heterosexuals, homosexuals, and bisexuals in the adult population of the United States are

not known.[7] Different surveys have measured different aspects of sexual orientation and, consequently, have reached different estimates. For example, the National Health and Social Life Survey ("NHSLS Survey"), the most comprehensive survey to date of American sexual practices, found that approximately 5% of men and 4% of women reported having had sex with a same-sex partner since age 18.[8] E.O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States*, 294, 303 (1994).[9] A larger proportion of respondents—approximately 8% of men and women alike—reported that they experienced attraction

[7] Because homosexuality and bisexuality are widely stigmatized in American society (*see* pp. 23-24, *infra*), many individuals are reluctant or unwilling to reveal that they are not heterosexual, even in anonymous surveys. Recognition of this problem has led researchers to investigate a variety of methods for increasing respondents' willingness to report homosexual conduct. *See* C. F. Turner, L. Ku, S. M. Rogers, L. D. Lindberg, J. H. Pleck, and F. L. Sonenstein, *Adolescent Sexual Behavior, Drug Use, And Violence: Increased Reporting With Computer Survey Technology*, 280 Science 867-873 (1998). Researchers generally assume that estimates of the distribution of sexual orientation in the population underestimate the actual proportion of non-heterosexuals. *See, e.g.*, E.O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* 284 (1994) (NHSLS Survey); S.M. Rogers & C.F. Turner, *Male-Male Sexual Contact in the USA: Findings From Five Sample Surveys, 1970-1990*, 28 J. Sex Res. 491, 513-514 (1991).

[8] The NHSLS Survey, which was conducted by researchers at the University of Chicago, was based on a representative sample of American adults between ages 18 and 59. *See* Laumann et al., *Social Organization of Sexuality*, *supra*, at 294.

[9] *See also* Rogers & Turner, *supra*, at 513-14 (estimating that at least 5-7% of U.S. men experienced same-sex sexual contact during adulthood); D. Black et al., *Demographics of the Gay and Lesbian Population of the United States: Evidence from Available Systematic Data Sources*, 37 Demography 139, 141-142 (2000) (finding that approximately 5% of men and 4% of women had at least one same-sex sexual experience since age 18, and approximately 3% of men and 1% of women reported sexual experiences in the preceding year exclusively with a partner of same sex).

to persons of their own sex, considered the prospect of sex with a same-sex partner appealing, or both. *See id.* at 305.

C. The Development Of Sexual Orientation

Heterosexual and homosexual behavior are both normal aspects of human sexuality. Both have been documented in many different human cultures and historical eras, and in a wide variety of animal species.[10] There is no consensus among scientists about the exact reasons why an individual develops a heterosexual, bisexual, or homosexual orientation.[11] According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience.[12]

[10] *See generally* J. Boswell, *Christianity, Tolerance and Homosexuality* (1980); D.F. Greenberg, *The Construction Of Homosexuality* (1988); S.O. Murray, *Homosexualities* (2000); E. Blackwood & S.E. Wieringa eds., *Female Desires: Same-Sex Relations And Transgender Practices Across Cultures* (1999); B. Bagemihl, *Biological Exuberance: Animal Homosexuality And Natural Diversity* (1999); C.S. Ford & F.A. Beach, *Patterns Of Sexual Behavior* (1951).

[11] Although much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors. The evaluation of *amici* is that, although some of this research may be promising in facilitating greater understanding of the development of sexual orientation, it does not permit a conclusion based in sound science at the present time as to the cause or causes of sexual orientation, whether homosexual, bisexual, or heterosexual. *See generally Sexual Orientation*, in 7 *Encyclopedia of Psychology*, *supra*, at 260-263; *Homosexuality*, in 2 *Corsini Encyclopedia*, *supra*, at 683-688.

[12] *See* R.C. Savin-Williams, *. . . And Then I Became Gay: Young Men's Stories* 1-19 (1998) (reviewing research); G. Remafedi, *Demography of Sexual Orientation in Adolescents*, 89 Pediatrics 714 (1992); A. Bell et al., *Sexual Preference: Its Development in Men and Women* 186-187 (1981); R.C. Savin-Williams & L.M. Diamond, *Sexual Identity Tra-*

Most or many gay men and lesbians experience little or no choice about their sexual orientation. In the Kinsey studies of the 1940s and 1950s, for example, substantial numbers of respondents reported never experiencing sexual attraction to members of the other sex, and many others reported experiencing only incidental attractions to or behaviors with the other sex.[13] More recent studies have reported that most gay men and most or many lesbians experience either no choice or very little choice in their sexual attraction to members of their own sex. In a study that included a community-based sample of 125 gay men and lesbians, 80% of the gay men and 62% of the lesbians said they had "no choice at all" about being gay, lesbian, or bisexual. *See* G.M. Herek et al.,

jectories Among Sexual-Minority Youths: Gender Comparisons, 29 Archives of Sexual Behavior 419 (2000) (reporting data from a sample of 164 sexual-minority young adults, aged 17-25 years, and finding that first recognizing same-sex attractions preceded first same-sex sexual experience by, on average, approximately 6 years for males, and 7 years for females).

[13] In interviews with more than 10,000 adults, Alfred Kinsey and his colleagues categorized respondents according to the extent to which their sexual behaviors and emotional attractions and fantasies were heterosexual or homosexual after the onset of adolescence. Kinsey et al. reported that 4% of the white males in their sample were exclusively homosexual. *See* A. Kinsey et al., *Sexual Behavior in the Human Male* 651 (1948). In their study of female sexuality, they reported that 1-3% (depending on current age) of unmarried and previously married respondents were exclusively homosexual between the ages of 20 and 35. *See* A. Kinsey et al., *Sexual Behavior in the Human Female* 474, 488 (1953). The extent to which the percentages reported by Kinsey and his colleagues can be generalized to the current U.S. population has been a topic of controversy. *See generally* S. Michaels, *The Prevalence of Homosexuality in the United States*, in *Textbook of Homosexuality and Mental Health* 43 (R.P. Cabaj & T.S. Stein eds., 1996). Whether or not Kinsey's findings accurately describe the current distribution of heterosexuals, homosexuals, and bisexuals in the general population, however, they document the existence of a sizable number of individuals whose history of sexual attractions and behaviors is exclusively or almost entirely homosexual.

Correlates of Internalized Homophobia In a Community Sample of Lesbians and Gay Men, 2 J. Gay & Lesbian Med. Ass'n 23 (1998). The same researchers subsequently conducted a larger study that included 898 gay men and 980 lesbians. In that larger study, 85% of the gay men and 68% of the lesbians reported having either "no choice" or "very little choice" about their sexual orientation.[14] Other studies have reached similar conclusions.[15]

D. The Recognition That Homosexuality Is Not A "Mental Disorder"

The American mental health professions concluded more than a quarter-century ago that homosexuality is not a mental disorder.[16] That conclusion was reached after decades of study of homosexuality by independent researchers, as well as numerous attempts by practitioners in the mental-health professions to effectuate a change in individuals' sexual orientation. During the first half of the 20th century, many mental health professionals regarded homosexuality as a pathological condition, but that perspective reflected untested

[14] *See* G.M. Herek, et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. Consulting & Clinical Psychol. 945 (1999) (describing study). In the larger study, responses to the question about the degree of choice that respondents experienced surrounding their sexual orientation were not included in the published report but are on file with *amicus* American Psychological Association, and will be provided to the Court upon request.

[15] *See* R.C. Savin-Williams, *Gay and Lesbian Youth: Expressions of Identity* 77, 79 (1990); S. Rosenbluth, *Is Sexual Orientation A Matter of Choice?*, 21 Psychol. Women Q. 595, 603 (1997).

[16] A mental disorder is "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (*e.g.*, a painful symptom) or disability (*i.e.*, impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* xxxi (4th ed. text rev. 2001) ("DSM-IV-TR").

assumptions supported largely by clinical impressions of patients seeking therapy and individuals whose conduct brought them into the criminal justice system. *See* J.C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in *Homosexuality: Research Implications for Public Policy* 115 (J.C. Gonsiorek & J.D. Weinrich eds., 1991). Those assumptions were not subjected to rigorous scientific scrutiny with nonclinical, non-incarcerated samples until the latter half of the century. Once the notion that homosexuality is linked to mental illness was empirically tested, it proved to be based on untenable assumptions and value judgments.

In one of the first rigorous examinations of the mental health status of homosexuality, Dr. Evelyn Hooker administered a battery of standard psychological tests to homosexual and heterosexual men who were matched for age, IQ, and education. *See* Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. Projective Techniques 17-31 (1957). None of the men was in therapy at the time of the study. Based on the ratings of expert judges who were kept unaware of the men's sexual orientation, Hooker determined that homosexual and heterosexual men could not be distinguished from one another on the basis of the psychological testing, and that a similar majority of the two groups appeared to be free of psychopathology. She concluded from her data that homosexuality is not inherently associated with psychopathology and that "homosexuality as a clinical entity does not exist." *Id.* at 18-19. Hooker's findings were followed over the next two decades by numerous studies, using a variety of research techniques, which similarly concluded that homosexuality is not related to psychopathology or social maladjustment.[17]

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[17] For reviews, *see* Gonsiorek, *Empirical Basis*; *supra*, at 115; J.C. Gonsiorek, *Results of Psychological Testing On Homosexual Populations*, 25 Am. Behavioral Sci. 385, 394 (1982); Bernard F. Reiss, *Psychological Tests in Homosexuality*, in *Homosexual Behavior: A Modern Reappraisal* 296 (J. Marmor ed. 1980); Hart et al., *Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature*, 39 J. Clinical Psychiatry 604 (1978).

In 1973, in recognition that scientific data do not indicate that a homosexual orientation is inherently associated with psychopathology, *amicus* American Psychiatric Association's Board of Trustees voted to remove homosexuality from the Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders.* That resolution stated that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights* (Dec. 15, 1973), *printed in* 131 Am. J. Psychiatry 497 (1974). That decision was upheld by a vote of the Psychiatric Association's membership the following year. After a thorough review of the scientific evidence, *amicus* American Psychological Association adopted the same position in 1975, and urged all mental health professionals to help dispel the stigma of mental illness that had long been associated with homosexual orientation. *See* Am. Psychol. Ass'n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975). *Amicus* National Association of Social Workers (NASW) has adopted a similar policy. *See* NASW, *Policy Statement on Lesbian and Gay Issues* (Aug. 1993) (approved by NASW Delegate Assembly), *reprinted in* NASW, *Social Work Speaks: NASW Policy Statements* 162 (3d ed. 1994).

Of course, as is the case for heterosexuals, some homosexuals have mental illnesses, psychological disturbances, or poor social adjustment. Gay men, lesbians, and bisexuals also may be at somewhat greater risk for some kinds of psychological problems because of stresses associated with the experiences of social stigma and prejudice (*see* pp. 23-27, *infra*).[18] But research conducted over four decades has estab-

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[18] *See* V.M. Mays & S.D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in*

lished that "homosexuality in and of itself bears no necessary relationship to psychological adjustment."[19] The efforts to "cure" homosexuality that were prevalent in earlier generations—which included hypnosis, administration of hormones, aversive conditioning with electric shock or nausea-inducing drugs, lobotomy, electroshock, and castration[20]—are now regarded by the mental-health professions as regrettable.

E. Efforts To Change Sexual Orientation

Section 21.06 prohibits only same-sex intimate behavior, and does not prohibit the same kinds of intimate sexual contacts when carried out in private between adults of different sexes. The law is therefore presumably based on the assumption that persons who engage in homosexual activity (or who desire to do so) either should live without the (for them) primary forms of sexual expression (with the obvious personal harm caused thereby) or should attempt to reorient their sexual interest towards members of the other sex. But scientific research does not support this assumption, and the clinical experience of *amici* contradicts it; indeed, all major national mental health organizations have officially expressed concerns about therapies promoted to change sexual orientation (*see* pp. 14-15, *infra*). Given the strong stigma against ho-

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the United States, 91 Am. J. Pub. Health 1869 (2001); S.E. Gilman et al., *Risk Of Psychiatric Disorders Among Individuals Reporting Same-Sex Sexual Partners in the National Comorbidity Survey*, 91 Am. J. Pub. Health 933 (2001); S.D. Cochran & V.M. Mays, *Relation Between Psychiatric Syndromes and Behaviorally Defined Sexual Orientation in a Sample of the US Population*, 151 Am. J. Epidemiology 516 (2000).

[19] Gonsiorek, *Empirical Basis*, *supra*, at 135; *see also* Gonsiorek, *Results of Psychological Testing*, *supra*, at 385, 394; *see also* Reiss, *supra*, at 296-311; Hart et al., *supra*, at 604.

[20] *See* D.C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, in *Homosexuality: Research Implications*, *supra*; C. Silverstein, *Psychological and Medical Treatments of Homosexuality*, in *Homosexuality: Research Implications*, *supra*, at 101, 106-111; J.N. Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 129 (1976).

mosexuality that remains in place in our society, however (*see* pp. 23-24, *infra*), it is perhaps not surprising that some persons who experience sexual attractions towards members of their own sex nonetheless feel that they should attempt to change their sexual orientation and seek treatment to that end.

Some groups and individuals continue to offer interventions—sometimes called "conversion" or "reparative" therapies—that purport to change sexual orientation from homosexual to heterosexual. To date, however, there has been no scientifically adequate research to show that interventions aimed at changing sexual orientation are effective or safe. Moreover, critical examinations of reports of the effectiveness of these therapies have highlighted numerous problems with such claims.[21] One scholar has thus concluded upon

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[21] First, in many behavior-change techniques, "success" has been defined as suppression of homoerotic response or mere display of physiological ability to engage in heterosexual intercourse. Neither outcome, however, is the same as adopting the complex set of attractions and feelings that constitute sexual orientation. Second, in some of the treatments, the persons in therapy have reduced their same-sex conduct, but have not necessarily developed or increased their heterosexual attractions. Third, in many published reports of conversion therapies, the participants' initial sexual orientation was never adequately assessed, and many bisexuals may have been mislabeled as homosexuals, with the consequence that the "successes" actually occurred among bisexuals who were highly motivated to adopt a heterosexual behavior pattern. The extent to which people have actually changed their behavior—even within the confines of these inadequate operational definitions—often has not been systematically assessed. Instead, only patients' self-reports and therapists' subjective impressions have been available, without the use of control groups or any methodological safeguards against bias. More rigorous objective assessments (*e.g.*, behavioral indicators over an extended period of time, evaluation by an independent third party who is unaware of which patients received the intervention) have been lacking. *See* D.C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221 (1994); Haldeman, *Sexual Orientation Conversion Therapy*, *supra*, at 149-160. Although some highly motivated individuals have reported that they changed their sexual orienta-

review of reports on "conversion therapy" that there is no reliable scientific evidence that "sexual orientation is amenable to redirection or significant influence from psychological intervention."[22]

In addition to the lack of scientific evidence for the effectiveness of efforts to change sexual orientation, there is reason to believe such efforts can be harmful to the psychological well-being of those who attempt them. Clinical observations and self-reports indicate that many individuals who unsuccessfully attempt to change their sexual orientation undergo considerable psychological distress. In fact, the potential psychological risks to some patients undergoing conversion therapies are sufficiently significant that treatment protocols have been developed to assist them in overcoming a wide range of psychological and relational problems.[23]

Accordingly, the mainstream view in the mental health professions is that the most appropriate response of a therapist treating an individual who is troubled about his or her homosexual feelings is to help that person cope with social prejudices against homosexuality and lead a happy and satisfying life as a lesbian or gay man.[24] Reflecting that view, all major national mental health organizations—including *amici* American Psychological Association, American Psychiatric

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tion to heterosexual subsequent to such interventions, their self-reports of change cannot be used to validate the efficacy or assess the safety of an intervention. Lacking controlled studies, it cannot be known to what extent these individuals would have changed regardless of the intervention that they underwent.

[22] Haldeman, *Practice and Ethics*, *supra*, at 224.

[23] *See* A. Shidlo & M. Schroeder, *Changing Sexual Orientation: A Consumers' Report*, 33 Prof. Psychol. Res. and Prac. 249 (2002); D.C. Haldeman, *Therapeutic Antidotes: Helping Gay and Bisexual Men Recover from Conversion Therapies*, 5 J. Gay & Lesbian Psychotherapy 117 (2001).

[24] *See, e.g., Guidelines for Psychotherapy with Lesbian, Gay, and Bisexual Clients*, 55 Am. Psychologist 1440, 1443 (2000); *see also* p. 15 n. 25, *infra* .

Association, and NASW, as well as the American Academy of Pediatrics and the American Counseling Association—have adopted policy statements cautioning the profession and the public about treatments that purport to change sexual orientation.[25]

II. Suppressing Sexual Intimacy Among Same-Sex Partners Would Deprive Gay Men And Lesbians Of The Opportunity To Participate In Fundamental Aspects Of Human Experience

A. The Importance Of Sexual Intimacy

As this Court has recognized, sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality."[26] The human impulse for sexual intimacy, as well as the importance of this impulse to the self and to the development of close relationships with others, have been observed and chronicled for centuries. The mental health professions have also long recognized the importance of the desire for sexual intimacy in the development of the self, in the

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[25] *See* Am. Psychol. Ass'n, *Resolution on Appropriate Therapeutic Responses to Sexual Orientation* (1998); Am. Psychiatric Ass'n, *Position Statement: Psychiatric Treatment and Sexual Orientation* (1998); Nat'l Ass'n of Social Workers, *Policy Statement: Lesbian, Gay, and Bisexual Issues* (1996); Am. Acad. Pediatrics, *Homosexuality and Adolescence* (1993); *Action by American Counseling Association Governing Council* (1999). These policy statements are available on the internet at http://www.apa.org/pi/lgbc/publications/justthefacts.html. The statement of *amicus* American Psychiatric Association cautions that "[t]he potential risks of 'reparative therapy' are great, including depression, anxiety and self-destructive behavior." The Psychiatric Association also observes that "[m]any patients who have undergone 'reparative therapy' relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction." The policy statement of the American Academy of Pediatrics advises that "[t]herapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation."

[26] *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 63 (1973).

establishment of close relationships, and in the maintenance of family units. And the most recent study of the sexual behavior of the American population has found that sexual satisfaction in intimate relationships is linked to satisfaction with those relationships and with general satisfaction with life.[27]

Of course, many individuals lead productive and psychologically healthy lives in which sex or an intimate partner does not play an important role. The importance of sexuality in relationships also varies considerably across individuals and throughout the life span. Texas, however, seeks to deny even the *opportunity* to participate in these profound aspects of human experience to a particular class of persons: gay men and lesbians. For those persons who predominantly experience erotic, affectional, and romantic attraction towards persons of the same sex, Texas Penal Code § 21.06 makes criminal the primary means by which they express the normal human impulse for sexual intimacy. Section 21.06 thus does not merely prohibit sexual conduct of a certain kind; it impinges on the ability of gay men and lesbians to participate in activities that have long been recognized as important aspects of humanity: to develop the emotional self, to build a supportive relationship with a partner, and to create a family unit.

B. The Importance Of Committed Relationships To Gay Men And Lesbians

Like their heterosexual counterparts, many gay men and lesbians desire to form long-lasting, committed relationships in which sexual intimacy plays an important part, and also succeed in doing so. Empirical studies using non-representative samples of gay men and lesbians typically report that large proportions are currently involved in a com-

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[27] E.O. Laumann et al., *Sexual Dysfunction in the United States: Prevalence and Predictors*, 281 JAMA 537 (1999) (reporting findings from NHSLS Survey).

mitted relationship (40-70% of gay men and 45-80% of lesbians), and that the vast majority have been involved in such a relationship at some time in their lives.[28] Recent surveys based on representative samples of gay men, lesbians, and bisexuals indicate that many of those couples are cohabiting.[29]

Additional information about lesbian and gay couples has become available from the 2000 census, which allowed individuals to indicate that they were a member of a same-sex couple living together in the same household. A preliminary analysis of the census data reported that same-sex couples head more than 594,000 households in the United States, with at least one same-sex couple in 99% of the nation's counties.[30] These findings from the census data represent a low estimate of the number of same-sex couples in the United States. Because of concerns about stigma—as well as lack of widespread information about this portion of the census form—it is likely that many same-sex couples did not identify themselves as such on the census form. In addition,

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[28] *See* L.A. Peplau & L.R. Spalding, *The Close Relationships of Lesbians, Gay Men and Bisexuals*, in *Close Relationships: A Sourcebook* 114 (Hendrick & Hendrick eds. 2000); L.A. Kurdek, *Lesbian and Gay Couples*, in *Lesbian, Gay, and Bisexual Identities Over the Lifespan* 243-261 (A.R. D'Augelli & C.J. Patterson eds. 1995) (reviewing literature).

[29] *See* Henry J. Kaiser Family Foundation, *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in Americu and the Public's Views on Issues and Policies Related to Sexual Orientation* 4 (2001) (28% of 405 lesbians, gay men, and bisexuals surveyed reported cohabiting with a partner) ("Kaiser Family Foundation Report"); T.C. Mills et al., *Health-Related Characteristics of Men Who Have Sex with Men: A Comparison of Those Living in "Gay Ghettos" with Those Living Elsewhere*, 91 Am. J. Pub. Health, 980, 982 tbl. 1 (2001) (39% of men living in identifiably gay neighborhoods and 33% of men living outside such neighborhoods reported currently having a committed relationship).

[30] U.S. Census Bureau, United States Census 2000, *Unmarried-Partner Households By Sex of Partners*, Table PCT 14, *available at* http://factfinder.census.gov; *see also Households Headed By Gays Rose in the 90's*, Data Shows, N.Y. Times, Aug. 22, 2001, at A17.

the census form permitted reporting only of cohabiting couples, thereby excluding non-cohabiting couples.

Research demonstrates that these committed relationships between gay partners strongly resemble heterosexual partnerships in many respects. Like heterosexual couples, gay couples form deep emotional attachments and commitments. Heterosexual couples, gay male couples, and lesbian couples all face similar issues—such as intimacy, love, equity, loyalty, and stability—and go through similar processes to address those issues.[31] Research examining the quality of intimate relationships also shows that gay and lesbian couples do not differ from heterosexual couples in their satisfaction with the relationship.[32] Thus, a 1991 review of the literature on gay and lesbian couples concluded that "most lesbians and gay men want intimate relationships and are successful in creating them. Homosexual partnerships appear no more vulnerable to problems and dissatisfactions than their heterosexual counterparts."[33]

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[31] *See generally* Peplau & Spalding, *Close Relationships*, *supra*, at 111, 114; *see also* R.A. Mackey et al., *Psychological Intimacy in the Lasting Relationships of Heterosexual and Same-Gender Couples*, 43 Sex Roles 201 (2000); L.A. Kurdek, *Differences Between Heterosexual-Nonparent Couples and Gay, Lesbian and Heterosexual-Parent Couples*, 22 J. Fam. Issues 727 (2001).

[32] "Empirical research has found striking similarities in the reports of love and satisfaction among contemporary lesbian, gay and heterosexual couples." Peplau & Spaulding, *Close Relationships*, *supra*, at 114. *See also* Mackey et al., *Psychological Intimacy*, *supra*; Kurdek, *Differences Between*, *supra*.

[33] L.A. Peplau, *Lesbian and Gay Relationships*, in *Homosexuality: Research Implications*, *supra*, at 195; *see also* Kurdek, *Differences Between*, *supra* (finding no differences between gay and lesbian couples and heterosexual couples without children on individual personality differences, views on relationships, conflict resolution, and satisfaction). A major study of heterosexual and gay couples in the United States undertaken in the early 1980s similarly concluded that "[c]ouplehood, either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals." P. Blumstein and P. Schwartz, *American Couples: Money, Work, Sex* 45 (1983).

As with heterosexual relationships, sexuality is an important aspect of most enduring gay and lesbian relationships. For same-sex couples, as for heterosexuals, sex serves to create a bond between the partners. "Having sex is an act that is rarely devoid of larger meaning for a couple. It always says something about partners' feelings for each other, what kind of values they share, and the purpose of their relationship." P. Blumstein & P. Schwartz, *American Couples: Money, Work, Sex* 193 (1983). Thus, for both gay and heterosexual couples, "a good sex life is central to a good overall relationship." *Id.* at 201, 205-206.[34] Gay and heterosexual relationships are thus similar in such basic respects as their emotional content, the importance of the relationship to the individual, and the role of sexuality in strengthening the relationship.

C. Gay Men And Lesbians As Parents

Not only do gay men and lesbians successfully form long-term intimate relationships that resemble heterosexual families; they also raise children together in these families. Although there are no data to indicate the exact number of lesbians and gay men in the United States who are parents, psychologists who study this topic suggest that hundreds of thousands, perhaps millions, of American parents today identify themselves as gay or lesbian, and that the children of lesbian and gay parents in the United States today almost cer-

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[34] *See also* L. Kurdek, *Sexuality in Homosexual and Heterosexual Couples*, in *Sexuality in Close Relationships* 177 (K. McKinney & S. Sprecher eds. 1991); L.A. Peplau, et al., *A National Survey of the Intimate Relationships of African-American Lesbians and Gay Men: A Look at Commitment, Satisfaction, Sexual Behavior, and HIV Disease*, in *Ethnic And Cultural Diversity Among Lesbians And Gay Men* 11 (B. Greene ed. 1997) (finding that greater sexual frequency and higher sexual satisfaction were correlated with relationship satisfaction among African-American lesbians and gay men).

tainly number in the millions. *See* C.J. Patterson & L.V. Friel, *Sexual Orientation and Fertility*, in *Infertility in the Modern World: Biosocial Perspectives* 238 (G. Bentley & N. Mascie-Taylor eds. 2000).

Over the past two decades, research about children of gay parents has yielded the consistent conclusion that these children demonstrate no deficits in intellectual development, social adjustment, or psychological well-being as compared to children of heterosexual parents.[35] A recent article surveying the scientific studies on this issue reported no differences between children raised by lesbians and those raised by heterosexuals with respect to self-esteem, anxiety, depression, behavioral problems, performance in social arenas (sports, school and friendships), use of psychological counseling, mothers' and teachers' reports of children's hyperactivity, unsociability, emotional difficulty, or conduct difficulty.[36] Thus, the evidence demonstrates that lesbians and gay men form family units that are similar in many respects to those of heterosexuals.

Of course, families headed by gay couples may encounter particular issues and challenges, much as families of racial and ethnic minority group members, low-income families, and single-parent families do. No evidence suggests, however, that families headed by gay couples are as a group unable to meet these challenges. Rather, the evidence demonstrates that lesbians and gay men frequently establish long-

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[35] *See* J. Stacey & T. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159-183 (2001); E.C. Perrin et al., *Technical Report: Coparent or Second-parent Adoption by Same-Sex Parents*, 109 Pediatrics 341, 342 (2002) (report of American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health); G.D. Green & F.W. Bozett, *Lesbian Mothers and Gay Fathers*, in *Homosexuality: Research Implications*, *supra*, at 197, 213; *see also* C.J. Patterson, *Children of Lesbian and Gay Parents*, 63 Child Dev. 1025 (1992).

[36] Stacey & Biblarz, *supra*, at 169, 171.

term, committed relationships strengthened by the bond of sexual intimacy between the partners, and with increasing incidence successfully raise children in those family settings.

D. The Role Of The Conduct Proscribed By Texas In Sexual Intimacy

Although Texas places the label "deviate sexual intercourse" on certain kinds of sexual contacts (*see* Texas Penal Code § 21.01(1); pp. 3-4, *supra*), it allows the choice of such acts by heterosexual couples, and social science research shows that those forms of contact are important aspects of sexual intimacy for many American heterosexual couples.[37] Oral sex, for example, is plainly common among many opposite-sex couples as well as same-sex couples. In 1994, the National Health and Social Life Survey (NHSLS Survey) found that at least 77% of adult males had engaged in oral sex with a partner, and that at least 68% of women had engaged in oral sex. *See* Laumann et al., *Social Organization of Sexuality*, *supra*, at 98. In the same study, at least 27% of men and 19% of women reported that they had engaged in oral sex in their most recent sexual experience. *See id.* These findings are consistent with results obtained in other studies.[38]

Research also indicates that significant numbers of heterosexuals engage in anal sex. The NHSLS Survey found that 26% of men and 20% of women had engaged in anal in-

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[37] This observation is not new in the field of sex research. In 1948, Kinsey estimated that, if the existing criminal laws forbidding various sex acts were enforced, 95% of all white American males would have been subject to prosecution. Kinsey et al., *Sexual Behavior in the Human Male*, *supra*, at 390-393.

[38] For example, a 1991 survey of U.S. males aged 20-39 years reported that 75% had performed oral sex on a partner, and 79% had received oral sex from a partner. J.O.G. Billy et al., *The Sexual Behavior of Men in the United States*, 25 Fam. Plan. Persps. 52, 57 (1993). Another study of 300 couples found that 93% of heterosexual couples had engaged in oral sex. *See* Blumstein & Schwartz, *supra*, at 236.

tercourse. *See* Laumann et al., *Social Organizion of Sexuality*, *supra*, at 99. Based on a review of the published literature and analysis of survey data, one study concluded that approximately 25% of U.S. adults have engaged in heterosexual anal intercourse. S.N. Seidman & R.O. Reider, *A Review of Sexual Behavior in the United States*, 151 Am. J. Psychiatry 330 (1994).[39]

For gay people, oral and anal sex are primary means of expressing sexual intimacy. Although gay men and lesbians engage in forms of sexual activity other than oral and anal sex, surveys have shown that oral sex is a primary means for expression of sexual intimacy for both gay men and lesbians, and that anal sex is a primary means of expressing sexual intimacy for gay men.[40] Research also reveals that these intimate forms of sexual contact can enhance both heterosexual and gay relationships, and that for gay people in particular, they provide emotional satisfaction and promote the formation of long-term bonds.[41]

None of the leading national associations of mental health professionals considers oral or anal sex to be pathological (*i.e.*, detrimental to mental health, psychological well being, or social adjustment). None of the diagnostic descriptions of mental disorders used by health-care practitioners, including the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text rev. 2001), includes oral or anal sex as pathological sexual syndromes, whether undertaken between

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[39] In another study, 20% of males aged 20-39 reported that they had had anal sex. Billy et al., *supra*, at 56. *See also* B. Powis et al., *Heterosexual Anal Intercourse, Health Risks and Drug Use*, 14 Drug and Alcohol Rev. 223 (1995).

[40] *See, e.g.*, Laumann et al., *Social Organization of Sexuality*, *supra*, at 318; Blumstein & Schwartz, *supra*, at 236; *see also* D.P. McWhirter & A.M. Mattison, *The Male Couple: How Relationships Develop* 277 (1984); A.P. Bell & M.S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 328-330 (1978).

[41] *See* Blumstein & Schwartz, *supra*, at 237-240.

persons of different sexes or the same sex. Accordingly, understood from the perspective of the broad patterns of sexual activity in which couples engage in our society, oral and anal sex are not "deviate," but are normal and important means for many couples to develop bonds of sexual intimacy.

III. Antisodomy Statutes Like Section 21.06 Reinforce Prejudice, Discrimination, And Violence Against Gay Men And Lesbians

A. Discrimination, Prejudice, And Violence Encountered By Gay People

Lesbians and gay men in the United States encounter extensive prejudice, discrimination, and violence because of their sexual orientation.[42] Intense prejudice against gay men and lesbians was widespread throughout much of the 20th century; public opinion studies routinely showed that, among large segments of the public, gay people were the target of strong antipathy.[43] Although a shift in public opinion concerning homosexuality occurred in the 1990s,[44] hostility toward gay men and lesbians remains common in contempo-

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[42] *See generally, e.g.*, M.V.L. Badgett, *Money, Myths, And Change: The Economic Lives Of Lesbians And Gay Men* (2001); K.T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19 (G. Herek & K. Berrill eds., 1992); B. Perry, *In The Name Of Hate: Understanding Hate Crimes* 21-25 (2001); G.M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in *Homosexuality: Research Implications*, *supra*, at 60; G.M. Herek, *The Psychology of Sexual Prejudice*, 9 Current Dirs. in Psychol. Sci. 19 (2000).

[43] *See* A.S. Yang, *Trends: Attitudes Toward Homosexuality*, 61 Pub. Opinion Q. 477 (1997); W. Schneider & I.A. Lewis, *The Straight Story On Homosexuality and Gay Rights*, 2/3 Pub. Opinion 16-20, 59-60 (1984); C. De Boer, *The Polls: Attitudes Toward Homosexuality*, 42 Pub. Opinion Q. 265 (1978); C.R. Wilcox & R. Wolpert, *Gay Rights in The Public Sphere: Public Opinion On Gay And Lesbian Equality*, in *The Politics Of Gay Rights* 409 (C.A. Rimmerman et al. eds. 2000).

[44] *See* K. Sherrill & A.S. Yang, *From Outlaws to In-Laws: Anti-Gay Attitudes Thaw*, 11 Pub. Persps. 20 (2000); A.S. Yang, *Trends*, *supra*.

rary American society.[45] Prejudice against bisexuals appears to exist at comparable levels.[46] Discrimination against gay people in employment and housing also appears to remain widespread.[47]

The severity of this anti-gay prejudice is reflected in the consistently high rate of anti-gay harassment and violence in American society. Numerous surveys indicate that verbal harassment and abuse are nearly universal experiences of gay people.[48] Although physical violence is less common, substantial numbers of gay people report having experienced crimes against their person or property because of their sexual orientation.[49] In 2001, the most recent year for which FBI statistics are available, there were 1,375 reported bias-motivated incidents against gay men, lesbians, and bisexuals.[50] That figure likely represents only a fraction of such crimes, because reporting of hate crimes by law enforcement agencies is voluntary, the thoroughness of police statistics differs widely among jurisdictions, and many victims do not report their experiences to police because they fear further harassment or lack confidence that the assailants will be caught.[51]

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[45] G.M. Herek, *Gender Gaps In Public Opinion About Lesbians and Gay Men*, 66 Pub. Opinion Q. 40 (2002); Sherrill & Yang, *supra*, at 21 (noting that "gay people remain the most systematically and intensely disliked of all the groups measured" in the ongoing American National Election Studies).

[46] G.M. Herek, *Heterosexuals' Attitudes Toward Bisexual Men And Women In The United States*, 39 J. Sex Res. 269 (2002)

[47] *See generally* M.V.L. Badgett, *Money, Myths and Change*, *supra*.

[48] *See* Berrill, *supra*, at 20 (in 24 surveys, median proportion of respondents who had been verbally harassed was 80%); *see also* Kaiser Family Foundation Report, *supra*, at 3 (in a random sample of 405 lesbians, gay men, and bisexuals from 15 major US metropolitan areas, 79% of lesbians and 82% of gay men reported having experienced verbal abuse, such as slurs or name-calling, because of their sexual orientation; A.R. D'Augelli & A.H. Grossman, *Disclosure of Sexual Orientation, Victimization, and Mental Health Among Lesbian, Gay, and Bisexual Older Adults*, 16 J. Interpers. Viol. 1008, 1016-1017 (2001) (63% of 416 lesbian, gay, or bisexual adults, age 60 and older, reported experiencing verbal harassment because of their sexual orientation at least once); Herek et al., *Psychological Sequelae*, *supra*, at 948 (56% of 2,259 lesbian, gay, and bisexual survey respondents reported verbal harassment because of their sexual orientation in the previous year); G.M. Herek et al., *Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 12 J. Interpers. Viol. 195, 210 tbl. 5 (1997) (82% of 142 gay, lesbian, and bisexual respondents reported having experienced verbal abuse related to their sexual orientation since age 16); N.W. Pilkington & A.R. D'Augelli, *Victimization Of Lesbian, Gay, And Bisexual Youth In Community Settings*, 23 J. Community Psychol. 34-56 (1995) (80% of 193 respondents in a multi-state sample of adolescents and young adults reported experiencing verbal harassment related to their sexual orientation at least once).

[49] *See* Berrill, *supra*, at 20 (across 24 separate studies a median of 44% of gay, lesbian, and bisexual respondents reported having been threatened with violence because of their sexual orientation, 19% had their property vandalized, 17% had been physically assaulted); Herek et al., *Psychological Sequelae*, *supra*, at 947 tbl. 1 (in a community-based sample, 28% of 898 gay men and 19% of 980 lesbians had experienced an antigay crime in adulthood); Kaiser Family Foundation Report, *supra*, at 4 (32% of 405 lesbian, gay, and bisexual adults reported that they had been targeted for violence against their person or property because of their sexual orientation); Herek et al., *Hate Crime Victimization*, *supra*, at 202 (41% of respondents reported having experienced a crime against their person or property because of their sexual orientation, and another 9.5% reported an attempted crime); Pilkington & D'Augelli, *Victimization*, *supra*, at 41 tbl. 1 (18% of 193 lesbian, gay, and bisexual adolescents and young adults reported having been assaulted because of their sexual orientation).

[50] http://www.fbi.gov/ucr/01hate.pdf at 9 (visited Jan. 4, 2003).

[51] Herek et al., *Psychological Sequelae*, *supra*, at 947 (study of 2,259 gay men, lesbians, and bisexuals found that gay men had reported only 46% of hate-crime victimizations but 72% of other victimizations, and lesbians had reported only 36% of hate-crime victimizations but 68% of other victimizations). It also appears that, when gay people are subjected to violence based on their sexual orientation, they experience even greater psychological trauma than when they are subjected to other kinds of violent crime. *See id.* at 948-949 (gay men and lesbians who had experienced a crime against their person based on their sexual orientation manifested significantly higher levels of depressive symptoms, traumatic

Although homosexuality is not a mental disorder, this societal prejudice against gay men and lesbians can cause them real and substantial psychological harm. Research indicates that experiencing rejection, discrimination, and violence is associated with heightened psychological distress among gay men and lesbians.[52] These problems are exacerbated by the fact that, because of anti-gay stigma, gay men and lesbians have less access to social support and other resources that assist heterosexuals in coping with stress.[53]

Although many gay men and lesbians learn to cope with the social stigma against homosexuality, efforts to avoid that social stigma through attempts to conceal or dissimulate sexual orientation can be seriously damaging to the psychological well-being of gay people. Lesbians and gay men have been found to manifest better mental health to the extent that they feel positively about their sexual orientation and have integrated it into their lives through "coming out" and participating in the gay community.[54] Being able to disclose

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stress symptoms, anxiety, and anger, compared to lesbians and gay men who had experienced comparable crimes during the same time period that were unrelated to their sexual orientation); *see also* L.D. Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J. Interpers. Viol. 366 (1990).

[52] Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. Health & Soc. Behav. 38 (1995); Herek et al., *Psychological Sequelae*, *supra*, at 947.

[53] *See* J. DiPlacido, *Minority Stress Among Lesbians, Gay Men, and Bisexuals: A Consequence of Heterosexism, Homophobia, and Stigmatization*, in *Stigma and Sexual Orientation: Understanding Prejudice Against Lesbians, Gay Men, and Bisexuals* 138 (G.M. Herek ed. 1998); Cochran & Mays, *Relation Between Psychiatric Syndromes and Behaviorally Defined Sexual Orientation*, *supra*; S.D. Cochran & V.M. Mays, *Lifetime Prevalence of Suicide Symptoms and Affective Disorders Among Men Reporting Same-Sex Sexual Partners: Results from NHANES III*, 90 Am. J. Pub. Health 573 (2000).

[54] S.K. Hammersmith & M.S. Weinberg, *Homosexual Identity: Commitment, Adjustment and Significant Others*, 36 Sociometry 56 (1973); G.M. Herek & E.K. Glunt, *Identity and Community Among Gay*

one's sexual orientation to others also increases the availability of social support, which is crucial to mental health.[55]

B. The Role Of Antisodomy Statutes In Reinforcing Anti-Gay Prejudice

A particularly troubling effect of antisodomy statutes like § 21.06 is that they foster a climate of intolerance in which gay men and lesbians feel compelled to conceal or lie about their sexual orientation to avoid personal rejection, discrimination, and violence.[56] This compulsion to remain "in the closet" reinforces anti-gay prejudices. Research has consistently shown that prejudice against minorities, including

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and Bisexual Men in the AIDS Era: Preliminary Findings from the Sacramento Men's Health Study, in *AIDS, Identity, and Community: The HIV Epidemic and Lesbians and Gay Men* 55 (G.M. Herek & B. Greene eds. 1995); J. Leserman et al., *Gay Identification and Psychological Health in HIV-Positive and HIV-Negative Gay Men*, 24 J. Applied Soc. Psychol. 2193 (1994).

[55] Antisodomy statutes may also affect the physical health of gay men and lesbians by discouraging them from being honest about their sexual orientation. *See* Herek, *Why Tell If You're Not Asked*, *supra*, at 211-212. Research indicates that hiding or actively concealing significant aspects of the self can have negative effects on physical health, whereas disclosure of such information to others can have positive health outcomes. *See generally* J.M. Smyth & J.W. Pennebaker, *What Are The Health Effects Of Disclosure?*, in *Handbook Of Health Psychology* (A. Baum et al. eds. 2001). One study of HIV-negative gay men demonstrates the potential health risks associated with having to hide one's sexual orientation. Over a five-year period, the researchers observed that those men who concealed their homosexuality were approximately three times more likely to contract various infectious diseases and cancer than gay men who did not conceal their identity. By controlling for other factors, the researchers concluded that this dramatic difference resulted from the psychological inhibition of personal identity. *See* S.W. Cole et al., *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15 Health Psychol. 243 (1996).

[56] G.M. Herek, *The Social Context of Hate Crimes: Notes on Cultural Heterosexism*, in *Hate Crimes*, *supra*, at 89; Herek, *Psychology of Sexual Prejudice*, *supra*.

gay people,[57] has been shown to decrease significantly when members of the majority group knowingly have contact with minority group members.[58] Consistent with this general pattern, empirical research demonstrates that having personal contact with an openly gay person is one of the most powerful influences on heterosexuals' tolerance and acceptance of gay people. Anti-gay attitudes are significantly less common among members of the population who report having a close friend or family member who is gay or lesbian.[59] Prejudice tends to be lower when a lesbian or gay friend or family member has directly disclosed her or his sexual orientation to a heterosexual person, compared to when the former's sexual orientation has not been directly discussed.[60] Such disclo-

[57] As noted in social psychological textbooks, although the specific content of prejudice varies across different minority groups, the psychological dynamics of prejudice are similar regardless of the group toward which that prejudice is directed. *See, e.g.*, S. L. Franzoi, *Social Psychology* 232-274 (3d ed. 2003); K.J. Gergen & M.M. Gergen, *Social Psychology* 140-141 (1981).

[58] A meta-analysis of hundreds of studies of contact and prejudice based on sexual orientation, nationality, race, age, and disability found a highly robust inverse relationship between contact and prejudice. That analysis also found that more rigorous studies (based on observed contact rather than reported contact) yielded greater effects, that contact changed attitudes towards the entire "outgroup" (not just towards those individuals with whom subjects had contact), and that majority group participants experienced greater changes in attitude than minority group members. *See* T.F. Pettigrew & L. Tropp, *Does Intergroup Contact Reduce Prejudice?*, in *Reducing Prejudice and Discrimination: Social Psychological Perspectives* 93 (S. Oskamp ed. 2000).

[59] *See* G.M. Herek & J.P. Capitanio, *"Some Of My Best Friends": Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 Personality & Social Psychol. Bull. 412 (1996); G.M. Herek & E.K. Glunt, *Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey*, 30 J. Sex Res. 239 (1993); *Familiarity Encourages Acceptance*, 11 Pub. Perspective 31 (2000); Schneider & Lewis, *The Straight Story*, *supra*, at 16-20, 59-60.

[60] Herek & Capitanio, *Some of My Best Friends*, *supra*, at 416.

sure, however, is often inhibited by fears of prejudice, social ostracism, discrimination, and violence.[61] By reinforcing such stigma, antisodomy laws help to deter gay people from disclosing their sexual orientation; that silence prevents heterosexuals from interacting with openly gay people, which in turn reinforces anti-gay prejudice.

Finally, by discouraging gay people from disclosing their sexual orientation, antisodomy statutes impair the effectiveness of laws and law enforcement initiatives designed to deter violent crimes against gay men and lesbians.[62] For such laws to be effective, victims must be willing to volunteer information to law enforcement authorities that would indicate the crime is bias-related. A substantial proportion of gay people who are victimized in anti-gay crimes, however, do not inform the police. Concerns about stigmatization resulting from public disclosure of sexual orientation influence the decision of gay crime victims whether to report a crime. Gay crime victims also often perceive a risk of "secondary victimization" by police and law enforcement officials who learn about the victim's sexual orientation.[63] Thus, not only do antisodomy statutes discourage gay people from undertaking the steps necessary to overcome social prejudice (revealing their sexual orientation to acquaintances), they also deter gay people from seeking legal redress when they are directly

[61] Herek, *Why Tell If You're Not Asked?*, *supra*, at 198-209.

[62] *See, e.g.*, Hate Crimes Statistics Act, Pub. L. No. 101-275, codified at 28 U.S.C. § 534 note, *as amended*, Pub. L. No. 104-155 (mandating collection of data for crimes based on race, ethnicity, religion, disability, and sexual orientation); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, codified at 28 U.S.C. § 994 note (mandating enhanced sentences for federal hate crimes, including crimes based on victim's actual or perceived sexual orientation).

[63] *See* G.M. Herek et al., *Victim Experiences in Hate Crimes Based on Sexual Orientation*, 58 J. Social Issues 319-339 (2002); G.M. Herek & K.T. Berrill, *Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy*, in *Hate Crimes*, *supra*, at 289-305.

and severely injured by violent manifestations of that prejudice.

CONCLUSION

The judgment of the Texas Court of Appeals should be reversed, and the criminal proceedings against petitioners should be dismissed.

Respectfully submitted.

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